OPERATOR, and 10ATT0+. In addition, the well-documented recent proliferation of prepaid calling cards and debit card services, all of which utilize access code dialing, demonstrate the wide consumer acceptance of access code dialing as a means for reaching their preferred carriers' services. It is well-recognized and well-documented that these services and others -- all of whom have been built upon consumer acceptance of access code dialing -- are marketplace success stories. They demonstrate far more persuasively than do pleadings, *ex parte* presentations, or focus groups, that consumers are willing to use access code-based services, and that promotion of such services can be a significant and successful component of IXC marketing strategy.

The Commission's suggestion that consumers face "trouble" in remembering their carrier's access code also is unsupported and is counterintuitive. The access codes in use today are well-promoted and nationally uniform. It is virtually impossible for any consumer to spend time reading, listening to, or viewing mass media without being barraged with constant advertising for 1-800-COLLECT, 1-800-OPERATOR, 10ATT, or similar codes used by other carriers. Moreover, even if BPP obviated the need for consumers to dial access codes, it would remain necessary for consumers to dial or otherwise communicate to IXC or LEC operator systems (or both) account numbers, calling card numbers (which often are not based on consumers' telephone line numbers, e.g., CIID card numbers), Personal Identification (PIN) numbers, account codes, etc. Unlike carrier access codes, these other numbers necessary to complete operator-assisted calls are usually not heavily advertised, not easily remembered, nor nationally uniform.[35]

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35 The Commission suggests at ¶ 10 of the Further Notice that the anticipated expansion in 1995 of 10XXX codes to 101XXXX codes may "further confuse callers and add to the burdens of access code dialing." This unsupported assertion disregards the fact that most of the growth in access code dialing services has involved 1-800 access-based services being actively marketed by IXCs, rather than 10XXX-based services. 1-800 access is widely accepted by consumers, heavily promoted by AT&T and other IXCs, and would not change as a result of expansion of 10XXX codes, as proposed by the Commission.

According to the Further Notice, the Commission estimates consumers could save approximately $280 million per year by avoiding "the highest priced OSPs."[36] This calculation appears to be based on the price difference in 1991 between the "Big 3" IXCs and a group the Commission calls the "third tier OSPs," and applied to projected growth in traffic for 1997. The reasonableness of such projections is, at best, highly speculative. First, it disregards any changes in rates -- either "Big 3" or "third tier OSP" -- between 1991 and 1997. Anyone even remotely familiar with the interexchange industry as it has developed over the decade since divestiture must recognize that IXC rates for all services, including 1+ and 0+ services, are volatile, and are unpredictable, and that even the "Big 3" carriers have, from time to time, raised their rates for services, including operator services.[37] Although the Commission expressly recognizes that OSPs either will "lower their rates or lose 0+ traffic,"[38] the Commission's projection of 1997 rate differences -- upon which its "savings" projection" is built, does not assume any reduction in rates by those carriers who will lose traffic unless they lower their rates. Further, the Commission has not specified what traffic it assumes will be subject or will not be subject to BPP -- except that it excludes intraLATA traffic. As will be explained in Section IV of these comments, *infra*, it is questionable whether and, in some cases, unlikely that, BPP will be able to accommodate several important categories of 0+ traffic. Any estimation of anticipated savings to be occasioned by BPP without knowing which traffic will be subject to BPP -- and when -- is inherently suspect and unreliable. One example of this involves intrastate interLATA traffic. Apparently, the Commission assumes that every

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36 Further Notice, *supra*, at ¶ 11.

37 For example, it was reported in the July 25, 1994 issue of Communications Daily (at page 3) that on Friday, July 22, AT&T filed tariff revisions with the Commission wherein AT&T proposes to raise its rates on domestic and international calling card and operator-assisted calls. According to that report, rates for calling card calls to certain countries would increase by as much as twenty-five percent.

38 Further Notice, *supra*, at ¶ 11.

multiLATA state will require BPP and will require that it be implemented in the same manner as it is implemented for interstate calling. To assume that all of the states will agree with the FCC and with each other on anything, including BPP implementation, is unrealistic.

b. BPP is Not Necessary to Eliminate AT&T's Advantages in the Operator Service Market. Other Means for Eliminating AT&T's Advantages are Available to the Commission

Another "benefit" of BPP suggested by the Commission is that BPP would eliminate AT&T's advantages in the operator service marketplace.[39] According to the Commission's logic, AT&T enjoys an advantage over competing OSPs as a result of its large customer base and its wide distribution of "proprietary" calling cards. This advantage, according to the Further Notice, enables AT&T to pay lower commission rates while still promising aggregators higher total commission income since AT&T is able to complete more commissionable calls than its OSP competitors. Further, the Commission asserts that AT&T is the only carrier able, as a practical matter, to offer 0+ dialing since most aggregator phones are presubscribed to AT&T.

The Commission proposes to eliminate these AT&T advantages by mandating the implementation of BPP. Apparently, the Commission believes that BPP will enable any OSP calling card to be used to access the cardholder's preferred carrier on a 0+ basis. Whether or not BPP would eliminate -- or even reduce -- AT&T's advantages in the 0+ market is questionable. What is not questionable is that other means for neutralizing AT&T's advantages are available to the Commission, and, indeed, proposals to utilize those other means are before the Commission in another phase of this proceeding.

The purportedly "proprietary" calling cards referenced by the Commission in paragraph 14 of the Further Notice are the calling cards issued by AT&T in the Card

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39 *Id.* at ¶¶ 2, 14-15.

Issuer Identifier ("CIID") format, millions of which have been issued by AT&T beginning in 1991.[40] These cards were sent by AT&T unsolicited to millions of holders of AT&T and LEC line number-based calling cards, along with misinformation that the issuance of those cards was compelled by nonexistent "government regulations" and instructions to the cardholders to destroy their line number-based (i.e., non-proprietary) calling cards. Moreover, those CIID cards came with instructions to use them on a 0+ basis, despite the fact that they could not be used on a 0+ basis from telephones presubscribed to other OSPs. The Commission's response to these practices was to "slap AT&T's wrist" in the form of a letter of admonition,[41] while allowing AT&T to continue to issue these cards --unusable with the services of any other OSP (except for those specifically permitted to do so by AT&T) -- as 0+ calling cards. In that letter of admonition, the Commission concluded that AT&T's behavior regarding its CIID card distribution practices were misleading and irresponsible, stating as follows:

> We . . . find AT&T's explanations regarding its CIID card marketing practices to be seriously lacking in a number of respects. It appears that AT&T's marketing literature, with its vague references to government requirements, may have persuaded many consumers to unnecessarily destroy or discard otherwise valid calling cards issued by AT&T jointly with the BOCs, or in some cases, by the BOCs individually. . . . We find that AT&T's reference to "government requirements" in its literature would be understandably confusing to most of the literature's intended readers. In particular, the unequivocal directive to "destroy" existing cards was overly broad and unqualified. . . . We believe that AT&T reasonably could have realized that many members of the general public holding telephone credit cards issued by local exchange carriers individually or in shared use with AT&T, were, or could readily have been, misled into destroying otherwise valid cards to their detriment as well as the detriment of

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40 According to AT&T estimates, AT&T has issued more than forty million CIID cards.

41 See Letter to Mr. Robert E. Allen, Chairman and Chief Executive Officer, AT&T, from Donna R. Searcy, Secretary, By Direction of the Commission, 7 FCC Rcd. 7529 (1992).

other issuers of telephone credit cards that compete with AT&T in this market.[42]

Notwithstanding the Commission's conclusions about AT&T's CIID card practices, and the competitive advantage derived by AT&T from those practices, the Commission took no action intended to limit or neutralize those advantages. The Commission could have eliminated AT&T's advantage derived from its large embedded base of customers and its CIID card distribution practices and usage instructions simply by requiring that those cards be treated in the same manner as all other 0+ calling cards -- by making them available for validation by IXC/OSPs on a nondiscriminatory basis. Alternatively, the Commission could have directed that those cards, like all proprietary calling cards, be limited to access code dialing. Although the Commission proposed such requirements, it declined to adopt them.[43]

Incredibly, the Commission's stated reason for declining to implement those proposals (which it, and others, chose to call "0+ Public Domain") was that their costs outweighed their benefits.[44] Notwithstanding that assertion, the Commission's CIID Card Decision contained no quantitative analysis of either the costs or the benefits associated with the Commission's CIID card proposal. Nothing in the record of that proceeding indicated -- or even suggested -- that the costs of implementation of that proposal would have approached even a fraction of the $ one billion plus minimum price tag already established for BPP -- a price tag which, as indicated at Section II of these comments, appears to be significantly understated and incomplete.[45]

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42 *Id.* at 7530.

43 Billed Party Preference for 0+ InterLATA Calls (*Report and Order and Request for Supplemental Comment*), 7 FCC Rcd. 7714 (1992), *recon. pending* (CIID Card Decision).

44 Further Notice, *supra*, at ¶ 4 n. 7.

45 While the Commission's stated reason for declining to take action in response to AT&T's CIID card issuance and marketing behavior was that the costs outweighed the benefits, the real, albeit unstated, reason may have been that such action could have been construed as the imposition of additionalregulatory requirements on AT&T at a time

Petitions for reconsideration of the Commission's CIID Card Decision were filed more than one and one-half years ago.[46] Despite the passage of nearly nineteen months, those petitions remain pending. If the Commission is truly concerned about elimination of AT&T's competitive advantages in the operator service market, and doing so in a cost-effective manner, then it should reconsider its 1992 refusal either to require nondiscriminatory 0+ access to AT&T's CIID cards or limit usage of those cards to access code dialing.[47]

c. BPP Is Not Necessary To Provide Incentives To OSPs to Focus Their Competitive Efforts On End Users

In the Further Notice, the Commission speculates that implementation of BPP would stimulate competition also by causing OSPs to focus their competitive efforts on consumers rather than on payment of commission payments to aggregators. According to the Commission, this refocusing -- if it were to occur -- would result in "lower prices and better service."[48] Underlying this Commission assertion appears to its view that payment of commissions by OSPs, especially those that the Commission pejoratively has labeled as "third tier OSPs,"[49] to aggregators have driven up operator service rates, and that elimination of commission payments will drive down those rates. The problem with this theory is that the vast bulk of commission payments to aggregators are made, not by the

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when the Commission under its previous Chairman was committed to deregulation of AT&T at the earliest possible time. Apparently, this rush to deregulate the activities of a dominant carrier (with more than 71 percent of the nation's access lines, see n. 26, *supra*) may be underlying the Commission's enthusiasm for BPP. Among the "other benefits" of BPP listed by the Commission is that it might enable the Commission to "streamline regulation of AT&T's operator services." (Further Notice, *supra*, at ¶ 16).

46 See, e.g., Billed Party Preference for 0+ interLATA Calls (Phase I), Petition for Reconsideration of LDDS Communications, Inc., filed January 11, 1993.

47 The Commission's characterization of AT&T's CIID cards as "proprietary"9 (e.g. Further Notice, *supra*, at ¶ 14) is inaccurate. Those cards are not proprietary to AT&T. Rather they may be validated by, and hence accepted by, virtually all of the nation's LECs, as well as by certain providers of interexchange operator services chosen by AT&T to have access to its CIID validation data base. Examples of OSPs allowed by AT&T to accept its CIID cards include GTE Airfone, Alascom, and Stentor (the dominant Canadian long distance carrier).

48 Further Notice, *supra*, at ¶ 12.

49 See, e.g., *Id.* at ¶ 12 n. 25.

so-called "third-tier OSPs," but rather by the nation's leading carriers, including AT&T, MCI, Sprint, and all of the BOCs.[50] If long distance operator service calling rates are driven up by commission payments, then it would be expected that all OSPs, including the "Big 3" will reduce their rates if BPP is implemented and they no longer paid commissions. Does the Commission really expect AT&T, MCI and Sprint to voluntarily lower their operator service rates if and when BPP is implemented? Is the Commission prepared to direct those companies to reduce their 0+ rates following BPP implementation? Those carriers already complete among them in excess of ninety percent of the 0+ interLATA calls. There is little, if any basis, for concluding that BPP with its billion dollar plus implementation cost will reduce the rates on ninety percent or more of the nation's calls.

The incidental impact that elimination of commission payments is likely to have on OSP rates is even further minimized by the growing phenomenon of dial around calling. The Commission assumes that dial around calling will increase to fifty percent of the calls from "third-tier OSP" locations by 1997.[51] Based upon the dial around experience of Oncor, that figure is likely to be far too low. As indicated earlier, in the two years since adoption of the access code unblocking rules, Oncor has seen dial around calling from locations served by it increase at a rate of fifteen to twenty-five percent per year, a rate that is likely to accelerate given the introduction and growth of dial around-based services, and of prepaid calling cards. Based upon the current growth rate for dial around calling, Oncor believes that, by 1997, the dial around rate from aggregator phones served by it could be seventy-five to eighty percent or greater.

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50 BOCs and other LECs often pay commissions to premises owners where their public telephones are located pursuant to agent contracts with those premises owners. Presumably these commission payments to premises owner aggregators are recovered by the BOCs and other LECs in the rates charged for the local and toll calls completed by the BOCs and other LECs from those phones.

51 Further Notice, *supra*, at n. 25.

Mandatory unblocking and increased dial around have sent a very clear message to OSPs: either reduce rates and provide value to your service or lose traffic. How any specific OSP will respond to this message will be a business decision for that OSP. As consumers learn that they can easily avoid higher charges by accessing their preferred carriers through access codes, they will do so, if they choose to do so.. OSPs faced with reduction in their traffic will have ample incentive to reduce rates, and, if necessary, reduce commissions. They do not need a billion dollar system of BPP to serve as an incentive to reduce commission payments.

The Commission candidly concedes that, even if OSP-paid commissions are eliminated as a result of BPP, consumers may not realize all of the savings from elimination of OSP commission payments. It states that aggregators may attempt to recoup some of that lost revenue through direct surcharges on end users or through increases in their prices for other goods and services, but that such charges are harmful to customer goodwill.[52] That is correct. It is, of course, equally correct that aggregator telephone prices themselves affect the aggregators' "goodwill." For example, in the hospitality industry, hotels are answerable to their customers for long distance charges incurred by those customers during their stays at hotels. Prudent hotel and motel owners consider the impact of telephone service and prices on their customer goodwill in deciding whether or not to accept commissions from OSPs who charge high prices.[53] Those restraints exist without implementation of BPP.

Relatedly, the Commission suggests that "competitive pressures" would limit aggregators' ability to raise their prices for other goods and services.[54] Whether or not that is true in general, in the case of the hospitality industry, long distance telephone

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52 *Id.* at ¶ 13.

53 The fact that hospitality industry aggregators are responsive to the impact of guest telephone service on their customer goodwill was expressly acknowledged by the Commission. See Further Notice, *supra*, at n. 26.

54 Further Notice, *supra*, at ¶ 13.

service is probably subject to greater competitive pressures than any other product or service provided by hotels and motels. For virtually all other products and services provided by a hotel (e.g., meals and beverages, sundries, laundry, copying services, etc.) in order for a guest to obtain a comparable product or service from a competitive provider, rather from the hotel or its franchisee, it is necessary for the guest to leave the hotel. Unlike the situation with respect to those products and services, a guest can use a competitive alternative to the hotel's chosen OSP simply by dialing an access from his/her room. Thus, contrary to the Commission's suggestion, long distance operator services are subject to greater competitive pressures and, therefore, greater price restraints than any other product or service provided by the hotels and motels.

Finally, the Commission states that BPP would benefit consumers by generating more efficient pricing. In support of this contention, the Commission explains that BPP would prevent premises owners from using artificially high operator service rates to cross-subsidize "artificially low" prices for other goods and services.[55] However, no support or explanation for this proposition is offered. Anyone who stays at hotels or motels must wonder what "artificially low" prices for other goods and services the Commission has in mind. Is the Commission referring to the "artificially low" hotel restaurant prices? the "artificially low" prices for toothpaste, medicines, clothing, and other sundries in hotel lobby shops? The "artificially low" laundry and dry cleaning service prices charged by hotels and motels? The "artificially low" photocopying and fax charges imposed by hotel business centers? There is no basis for concluding or even believing that high long distance rates keep the prices for these products and services "artificially low" as suggested by the Further Notice. As for the suggestion that BPP would produce "more efficient pricing," it strains credulity for the Commission to

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55 *Id.*

seriously suggest that adding one billion dollars or more to the cost of providing long distance telephone service will lead to more efficient pricing of that service.

IV. IRRESPECTIVE OF COST, BPP WOULD NEITHER PROVIDE A UBIQUITOUS OR NATIONALLY UNIFORM DIALING ARRANGEMENT FOR OPERATOR-ASSISTED CALLING

One of the fundamental principles upon which the Commission's BPP proposal is based is that it would establish a ubiquitous and uniform means for 0+ calling. For example, the Commission states that BPP would "guarantee that all callers would always reach the preferred carrier, while simplifying dialing arrangements on operator service calls."[56] Later, the Commission states that the principal benefit of BPP -- simplified dialing -- would only result if "BPP applied uniformly to all locations and all types of phones."[57] Clearly, comprehensive availability of BPP is critical to the Commission's tentative conclusion that BPP, despite its costs, would serve the public interest: As the Commission states:

> . . . if the benefits of BPP are to be fully realized, BPP must be implemented on a nationwide basis. Absent nationwide availability, BPP could increase rather than decrease confusion about operator service dialing rules.[58]

Notwithstanding the Commission's statements about the importance of uniform and nationwide implementation, such ubiquitous implementation appears to be highly unlikely and, probably, impossible. There are many categories of long distance operator-assisted calls which possibly, and in some cases, certainly, would not or could not be subject to BPP as envisioned by the Commission. Examples of calls which would not be subject to BPP (or at least without substantially increasing the cost of its implementation) include the following:

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56 *Id.* at ¶ 4 n. 5 (emphasis added).
57 *Id.* at ¶ 39.
58 *Id.* at ¶ 37.

1. Interstate IntraLATA Calls - By its terms, the Commission's BPP proposal is limited to interstate interLATA calls only. Yet, nowhere, either in the NPRM or in the Further Notice, has the Commission offered any justification for its opinion why BPP, if it is in the public interest, is any less in the public interest for intraLATA operator-assisted long distance calling. As the Commission recognizes, non-uniform implementation would "increase rather than decrease" consumer confusion about how to place operator-assisted calls. Most consumers do not know their own LATA boundaries, let alone the boundaries of LATAs away from their homes or businesses (most operator-assisted calls are made away from home). Yet, as proposed by the Commission, 0+ interstate intraLATA calls would be carried, not by the billed party's preferred carrier, but by another carrier not chosen by either the billed party or the calling party, i.e. the LEC serving the originating telephone.

Strangely enough, in another recently-initiated proceeding, the Commission has proposed to require presubscription and 1+ dialing for interstate intraLATA calls.[59] Yet, the Commission has provided no explanation for the facial inconsistency between its proposal that 1+ intraLATA calls be subject to presubscription but that 0+ intraLATA calls be excluded from BPP and, hence, "defaulted" to the LEC, irrespective of consumer choice, and irrespective of price.[60] Nonetheless, as proposed by the Commission, BPP would be limited to interstate interLATA calls, and despite the purported importance to

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59 Administration of the North American Numbering Plan (CC Docket No. 92-237, Phases One and Two) (*Notice of Proposed Rulemaking*), FCC 94-79, released April 4, 1994 ("NANP Rulemaking").

60 LECs often pay commissions to the premises owners of locations where LEC public phones are located in exchange for the right to place public phones at those locations. It is likely that those commission payments to premises owners increase LEC costs of providing intraLATA toll service and cause them to charge higher rates to consumers than many IXC/OSPs providing the same service. If, as the Commission, asserts in the Further Notice, commission payments to aggregators cause high OSP rates for interLATA calls, that would seem to be equally so for intraLATA calls. Yet, the Further Notice unexplainedly ignores the impact of commission payments on intraLATA call prices.

the Commission of nationwide uniformity, it would exclude this important category of interstate calls.

2. Intrastate InterLATA Calls - Under the Communications Act, the Commission's jurisdiction is limited to interstate and foreign communication service. It has no authority to order that BPP be implemented on an intrastate basis. In order for BPP to be ubiquitous and nationally uniform -- a necessary precondition to the Commission's tentative conclusion about BPP, it would have to be adopted by fifty state public service commissions, and would have to implemented in all fifty states in precisely the same manner as it would be implemented by the Commission for interstate calling. The likelihood of such national agreement among the states with the FCC and with each other seems remote. According to the Further Notice, nine state commissions (out of fifty) have supported the concept of BPP, and one has opposed FCC imposition of BPP for intrastate calls.[61] Based upon the record, there does not appear to be any consensus among the state commissions on BPP, and it seems most improbable that it would be implemented in a way that ensured that all operator-assisted calls, including intrastate interLATA calls, would be handled in the same manner.

3. Intrastate IntraLATA Calls - For the reasons described in the previous paragraphs, the Commission cannot mandate intrastate intraLATA implementation of BPP, nor is it likely that fifty states (or for that matter, any states) will require BPP for intrastate intraLATA calls. Most intraLATA calling is intrastate calling, and, as several commenting regulators have noted in this proceeding, application of BPP for intraLATA calling is a state regulatory matter.[62] Today, only a few states even have attempted to introduce intraLATA presubscription. Most states continue to require intraLATA 1+ and

61 Further Notice, *supra*, at ¶ 40.
62 *Id.* at n. 63.

0+ traffic to be carried by LECs. Thus, it is very improbable that any, let alone, all, of the states would require BPP for intraLATA calls.

4. Calls Charged to International Calling Cards - Many 0+ calls are placed by foreign visitors who use their telephone calling cards issued by foreign telephone companies to charge calls. For example, Bell Canada cards are accepted by U.S. carriers. As proposed by the Commission, BPP would not work with a non-U.S. carrier's calling card, and the originating LEC would have no basis on which to determine how to route a 0+ call charged to a foreign calling card. In order for BPP to be applicable to foreign calling cards, it would be necessary for the foreign card-issuing telecommunications company or foreign telecommunications administration to ask the cardholder to select a preferred U.S. OSP. Obviously, the Commission has no authority to order foreign companies or foreign governments to so ballot their customers, and foreign companies would not have any incentive to incur the expense of notification and balloting of their customers in order to support U.S. BPP.

5. Calls Charged to Commercial Credit Cards - According to the Further Notice, certain commercial credit card companies (e.g., MasterCard/VISA) have indicated that BPP could accommodate commercial credit cards.[63] Whether those companies and/or other commercial credit card-issuing companies would be willing to participate in BPP is by no means established. Like BPP, in general, this would, in part, be a function of cost. Comments indicate that inclusion of commercial credit cards in BPP would cost each BOC and GTE at least an additional $3 million. This does not include the costs that would be imposed on the credit card companies themselves. Two leading proponents of BPP -- MCI and Pacific Bell -- argue that the commercial credit card companies should be responsible for maintaining the databases to which BPP queries would be sent. Nothing in the record indicates what that expense would be or

63 *Id.* at ¶¶ 76-77.

whether these credit card companies would be willing to incur that expense. It is, of course, doubtful whether the Commission has the authority to require commercial credit card companies to incur these expenses or participate in BPP. Furthermore, in order for commercial credit cards to be incorporated into a system of BPP, it would become necessary for cardholders to choose a preferred OSP for each of their credit cards. For all of the foregoing reasons, it is questionable whether commercial credit cards would or could be part of any system of BPP mandated by the Commission.

6. Calls Charged to IXC Calling Cards Issued in a Non-CIID-Based Format - Currently, many IXCs, including several major national IXCs (e.g. MCI, Sprint, LDDS Metromedia, and Cable & Wireless), have issued their own calling cards using numbering formats other than the CIID format. IXCs issuing such cards instruct their cardholders to use those cards on an access code dial-up basis. There are several reasons why those carriers do so. Access code dialing assures that all of the customer's operator-assisted toll calls will be carried by the card-issuing carrier. Those customers do not have to worry about whether calls are interLATA or intraLATA or whether the call will be carried by another carrier. Often the rates charged for calls to those cards are lower than the rates charged either by the presubscribed carrier for an interLATA call, or than the rates charged by the LEC for an intraLATA call. Since the Commission's BPP proposal would not ensure that all of a customer's calls were carried by the carrier chosen by the customer, those card-issuing carriers are likely to continue to instruct their card-holding customers to use those cards in connection with dial up access. Thus, a substantial portion of calls charged to calling cards issued by IXCs in a non-CIID format will not be subject to BPP.

7. Calls Made by Persons Whose Preferred Carrier is Not a National Carrier - Many customers' preferred long distance carriers are local or regional carriers whose services are not marketed nationally, and which do not offer originating service

throughout the U.S. If a customer of such a carrier attempted to place an interstate interLATA 0+ call from a telephone in an area where its preferred carrier does not purchase Feature Group D access, the carrier would not be able to complete the call. The Commission's recommended solution is for the customer's preferred carrier to select a "secondary carrier" for the customer.[64] It is possible that the primary carrier would select the secondary carrier based on its perceptions of which secondary carrier would best serve the customers' needs. It is also possible, and indeed, probable, that the primary carrier would select the secondary carrier based upon payment by the secondary carrier of some form of compensation -- e.g., commissions on calls completed by the secondary carrier, discounts on transmission or other services, etc. Irrespective what criteria were used by the primary carrier to select the secondary carrier, the carrier chosen to carry the call would not be chosen by the party being billed for the call. Therefore, in those situations, BPP, and the purported public interests underlying BPP, would not be applicable.

8. Calls from Prison Phones - One aspect of the Commission's BPP proposal that has been subject to considerable opposition and controversy is the proposed applicability of BPP to calls made from prisons and other correctional institutions. According to comments filed in response to the NPRM[65] and early-filed comments in response to the Further Notice,[66] there exist serious toll fraud and personal security and public safety problems associated with calls from prisons, and there is substantial debate as to whether BPP would increase those risks. In the Further Notice, the Commission has sought additional comment on whether to exempt inmate phones from BPP. Given the record to date, and the Commission's own articulated concerns, it is at least questionable

64 *Id.* at ¶¶ 68-69.

65 *Id.* at ¶¶ 42-45.

66 See, e.g. comments of Onondaga County Department of Correction, filed July 7, 1994, comments of Monmouth County Correctional Institution, filed July 8, 1994, and comments of Oklahoma Sheriffs' Association, filed July 11, 1994.

whether BPP would, or should, be applicable to calls made from prisons and other confinement facilities.

9. Calls Placed from Areas Served by Many Independent LECs and Calls from Other Non-Equal Access Areas - Although the Commission has tentatively concluded that BPP, if it is to be implemented at all, should be implemented from independent LEC territories, that tentative conclusion does not appear to reflect any understanding of what the independent LEC implementation costs would be, especially those which have not upgraded their central offices to provide Feature Group D access. Not surprisingly, there is considerable opposition to mandatory BPP implementation from the smaller LECs who fear that BPP would be unduly costly to them.[67] It is possible that the Commission could direct those companies to implement BPP irrespective of its costs and irrespective of those companies' ability to bear those costs. However, that is unlikely. In the past, the Commission has avoided subjecting independent LECs, especially those smaller LECs which serve lightly populated, rural communities, to aggressive equal access and other network upgrade requirements and schedules. Instead, such changes have been required only when those companies' plants were otherwise scheduled for such modernization.[68] Therefore, it is at least possible, if not probable, that BPP would not be applicable for many years, if ever, to calls from territories served by many of the country's smaller LECs.

10. Calls from Telephones Connected to Toll Networks by Alternative Access Providers - In the Further Notice, the Commission notes that BPP could have an adverse impact on the development of local exchange competition, and that the record concerning

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67 See, e.g., comments cited in the Further Notice, at ¶ 41 and at n. 64.

68 See, e.g. MTS and WATS Market Structure, 100 FCC2d 861 (1985). In that decision, the Commission required those independent LECs not otherwise subject to equal access requirements pursuant to antitrust consent decrees, to provide equal access only after they had replaced electromechanical switches with stored program control switches, and then, only within three years of receipt of a *bona fide* request.

the effect of BPP on local competition is "particularly thin."[69] Little is known about how BPP would impact local exchange competition, whether competitive access providers or other local competitors could or should be subject to BPP, or whether mandatory BPP would, as asserted by Metropolitan Fiber Systems and the Association for Local Telecommunications Services, create a LEC bottleneck at a time when BOCs and other LEC interests are supporting regulatory reform on the basis that they have lost their local bottleneck monopolies.[70] What is known is that alternative access providers are in some instances connecting public telephones with interexchange carrier networks. For example, Teleport Communications provides public telephone service at New York City's Port Authority Terminal. Unless the Commission is prepared to direct that those companies and other private providers of access participate in BPP, calls from locations served by them also would not be subject to BPP.

As noted by the ten preceding examples, there are many situations which may not, and perhaps will not, be subject to BPP. Thus, irrespective of its implementation costs, BPP, as contemplated by the Commission, never will be more than a system to govern the routing of some interexchange operator-assisted calls from some locations, in some circumstances. Such an incomplete and inconsistently-implemented solution would, in the words of the Commission, "increase rather than decrease confusion about operator service dialing rates."[71]

V. BPP PRESENTS SERIOUS COST RECOVERY ISSUES WHICH MUST BE RESOLVED BEFORE BPP CAN BE IMPLEMENTED

As indicated in Section II, implementation of BPP would be extremely costly. Although the precise costs can not be determined from the record compiled to date, it

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69 Further Notice, *supra*, at ¶ 35.

70 See reply comments of MFS, Association for Local Telecommunications Services ex parte filing, cited at Further Notice, *supra*, at n. 59.

71 Further Notice, *supra*, at n. 37.

appears that the costs of BPP, especially if implemented in a comprehensive manner (e.g., applicable to the broadest amount of calls, including, for example, calls charged to commercial credit cards) with full consumer information and balloting, and with 14 digit screening, will exceed by a considerable margin the $1.1 billion estimate set forth in the Further Notice. More importantly, there are serious unresolved questions regarding how those considerable costs should be recovered, and from whom. Based upon the comments filed previously in this proceeding, it appears that those entities in favor of mandatory implementation of BPP do not want to bear its costs, and want others to pay for it, irrespective whether those others actually use the service.

For example, one of the major components of BPP is the cost of LEC deployment of Operator System Signaling 7 (OSS7). The Further Notice indicates that the cost of OSS7 will be at least $480 million.[72] MCI, perhaps the leading proponent of BPP, apparently does not want to pay any part of that cost. Characterizing OSS7 as a "general network upgrade," MCI has suggested that none of the OSS7 costs should be loaded into a BPP rate element.[73] There is no evidence that any OSS7 or implementation of BPP technology, in general, will have any purpose or network benefit other than to provide BPP.[74] Thus, based upon the principles of cost causation long recognized by the Commission, there would not seem to be any basis for recovering the costs of BPP from anyone other than users of that service.

There is a problem with that approach, and that problem demonstrates all too graphically a major fallacy in the Commission's tentative conclusion that BPP would serve the public interest. If the costs of BPP are to be recovered -- as they should be

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72 *Id.* at ¶ 21.

73 *Id.* at ¶ 22.

74 at ¶ 2 of the Further Notice, the Commission includes among the public interest benefits of BPP, that it would "enrich the nation's telecommunications infrastructure, paving the way for further network innovation." However, nothing in the record of this proceeding provides any support for that generalized assertion.

under general principles of cost causation -- from users of BPP, the Commission fears that IXC/OSPs would avoid those costs by instructing their customers to use access code dialing. As the Commission recognizes, such "bypass" of BPP by IXC/OSPs and their customers would drive down BPP usage and increase per call costs.[75]

In other words, if prospective users of BPP had to pay for the service based on their usage of it, they would avoid using the service and incurring the costs by having their customers dial access codes. This is a valid concern. By far, the largest IXC/OSP -- AT&T -- already has expended millions of dollars advertising its access code-based services and instructing its customers to use access code dialing. AT&T, like other carriers, but more so, is well-positioned to migrate its entire customer base to access code dialing and thereby avoid the totality of BPP costs. The irony is that the Commission's basis for "tentatively concluding" that BPP would serve the public interest, notwithstanding its costs, is that it would eliminate the need for access code dialing in order for callers to reach their preferred carriers. In the very same document that the Commission "tentatively concludes" that BPP, despite its cost of well in excess of $ one billion, would serve the public interest by eliminating access code dialing, it candidly concedes that users will willingly dial access codes to avoid having to pay rates which include the costs of BPP.

If BPP is in the public interest, IXC/OSPs and their customers should be willing to pay for it. If they are so unwilling to pay for it that they would use access codes to avoid it, then the Commission's tentative conclusion should be reexamined. What would not serve the public interest would be for the Commission to mandate BPP implementation and then require that its costs be recovered from among all IXC/OSPs and their customers, irrespective of their usage. Any service whose costs must be

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75 Further Notice, *supra*, at ¶ 58.

recovered from non-users cannot be in the public interest and should not be forced upon the IXC/OSP industry or the consuming public.

Several other cost recovery issues raised in the Further Notice also warrant brief comment. The Commission, upon the urging of several LEC commenters, has indicated that BPP should be treated as a "new service" for purposes of the Commission's price cap rules.[76] Under the price cap rules, classification as a new service would afford the LECs greater flexibility in pricing of the service, and presumably would enable them to charge higher prices. Based upon the standards for new services and for restructured services set forth in the price cap rules, BPP would not qualify as a "new service." Rather, it would be a "restructured service."

The Commission's rules define a "new service offering" as follows:

> A tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers.[77]

"Restructured service" is defined as follows:

> An offering which represents the modification of a method of charging or provisioning a service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers.[78]

In determining whether BPP would constitute a "new service" or a "restructured service" under these definitions, it must be remembered that BPP would be part of access service, and that the references to "ratepayers" and "customers" in those definitions are to ratepayers and customers of access service, which would include BPP. As proposed by the Commission, BPP would not be optional. It would replace telephone presubscription

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76 *Id.* at ¶ 57.
77 47 C.F.R. § 61.3(s).
78 47 C.F.R. § 61.3(dd).

as the only means for routing 0+ calls to access service customers. Thus, BPP would not "enlarge the range of service options available to access service ratepayers. It would, however, represent a modification of the method of provisioning access for 0+ service. As such, it would have to be treated as a "restructured service" under the Commission's rules.

In the Further Notice, the Commission states that it is not persuaded that BPP would require changes to jurisdictional separations.[79] This conclusion is based on the Commission's "confidence" that BPP, if required by the Commission, would be implemented for intrastate as well as interstate calling. As indicated at Section IV of these comments, ubiquitous intrastate BPP is by no means certain, and is, in fact highly questionable, if not improbable. What is certain is the law requires that there be a reasonable allocation of telephone company costs, including commonly-used plant costs, between the interstate and intrastate jurisdictions,[80] and that the Commission does not have authority to dictate to the states how to allocate and recover those costs which are assigned to the intrastate jurisdiction, irrespective of its view of how state actions in that regard impact federal policies.[81] Accordingly, mandatory implementation of BPP would necessitate that a Federal-State Joint Board proceeding be convened pursuant to Section 410 of the Communications Act[82] to consider the jurisdictional separations implications of BPP.[83]

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79 Further Notice, *supra*, at ¶ 60.

80 Smith v. Illinois Bell Telephone Company, 282 U.S. 133 (1930).

81 Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

82 47 U.S.C. § 410 (1992).

83 Apparently, the states agree with this conclusion. In the July 29, 1994 issue of Communications Daily (at p. 3), it was reported that the National Association of Regulatory Utility Commissioners (NARUC) Communications Committee proposed to NARUC that, if the Commission decides to implement BPP, referral of separations issues to a Joint Board is "absolutely necessary."

VI. BPP WOULD BE INCONSISTENT WITH THE EQUAL ACCESS PROVISIONS OF THE MODIFICATION OF FINAL JUDGMENT AS CONSTRUED BY THE COURT WITH JURISDICTION OF THE DECREE

The system of BPP contemplated by the Commission in the Further Notice would replace presubscription as the means for effectuating the BOCs' equal access obligations under the antitrust consent decree approved by the United States District Court for the District of Columbia in United States v. American Telephone and Telegraph Company.[84] Pursuant to that decree (known as the "Modification of Final Judgment" or "MFJ"), the BOCs are required to make available a tariffed access service which permits "each subscriber to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation."[85] For business and residential customers (including private aggregator locations), the subscriber is the owner of the telephone. In 1988, the MFJ court established premises owner presubscription as the means for making the MFJ's equal access requirements applicable to BOC (and GTE) public telephones.[86]

In adopting premises owner presubscription as the means for providing equal access from public telephones, the court considered, and rejected, several alternative means, including a system like BPP. Although the court spoke favorably of such a system in concept,[87] it declined to require that arrangement, in part because the necessary technology was not yet available, and its costs were unknown. As a result, subscriber presubscription for business and residential telephones, and premises owner

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84 552 F. Supp. 131 (D.D.C. 1982), *aff'd. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The GTE Telephone Operating Companies are subject to a similar consent decree with comparable equal access obligations. United States v. GTE Corporation, 603 F. Supp. 730 (D.D.C. 1984).

85 *Modification of Final Judgment*, Appendix B, ¶ B(2)(ii), 552 F. Supp. at 233.

86 United States v. Western Electric Co., 698 F. Supp. 348 (D.D.C. 1988).

87 698 F. Supp. at 360-361.

presubscription for public telephones (provided by the BOCs and GTE) are the equal access arrangements required by the antitrust consent decrees.

If the Commission were to require BPP to be implemented by the BOCs and by GTE, it would be requiring those companies to replace the equal access arrangements contained in the respective consent decrees as construed by the court with supervisory jurisdiction over those decrees with another arrangement, inconsistent with that approved by the court. Whether or not the MFJ court would, if asked, approve a system of BPP in lieu of presubscription is speculative and problematic. At this time, presubscripton is the only means sanctioned by the court. Until such time as the court were to order the BOCs and GTE companies to replace presubscription with BPP, presubscription remains a requirement of both decrees. To date, no party to the MFJ or the GTE decrees have made such a request.

The MFJ court has recognized that where there is a conflict between BOC obligations under the decree and federal regulatory requirements imposed by the Commission, the requirements of the decree and the judgment of the antitrust court would prevail.[88] This view is consistent with the generally-recognized requirement that when there are conflicts between an antitrust consent decree and federal regulation, it is the responsibility of the regulatory agency to formulate regulations which do not conflict with outstanding judicial orders, including antitrust consent decrees.[89]

Accordingly, a Commission order requiring the BOCs and GTE to replace the existing presubscription requirements with BPP would violate the provisions of valid and effective antitrust consent decrees, and would therefore be unlawful.

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88 United States v. AT&T, *supra,* 552 F. Supp. at 212.

89 See, e.g. United States v. National Broadcasting Company, Inc. 449 F. Supp. 1127, 1139 (C.D. Cal. 1978).

VII. THE COMMISSION's BPP PROPOSAL DOES NOT ADDRESS ITS IMPACT ON THE NATION's SMALL BUSINESSES IN VIOLATION OF THE REGULATORY FLEXIBILITY ACT

It is difficult to imagine any proposed Commission rule that would have a more profound impact on more small, and independently-owned, businesses than BPP. Among the hundreds of thousands of small businesses that would be subject to or otherwise affected by BPP are independent LECs which would be required to incur the costs of BPP implementation, smaller IXC/OSPs whose ability to grow their businesses and compete with dominant entrenched carriers by marketing their presubscribed services to aggregator locations would be reduced, if not eliminated entirely, private pay telephone service providers, who would lose their right to receive commission revenue from IXC/OSPs, pursuant to validly-executed and fully lawful contractual agreements, as well as other aggregators, public and private, who rely on IXC/OSP revenues to make available telephone service to their guests and to fund other aspects of their operations.

In enacting the Regulatory Flexibility Act[90] in 1980, Congress directed all government departments and agencies, including the Commission, to consider the impact of proposed rules on such "small businesses"[91] Specifically, each agency is required to include in its rulemaking proposal an initial regulatory flexibility analysis.[92] Although the NPRM includes an initial regulatory flexibility analysis, that analysis does not contain much of the information required by the Regulatory Flexibility Act.

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90 5 U.S.C. § 601 *et seq.*

91 The Regulatory Flexibility Act adopts as its definition of "small business," the definition of "Small Business Concern" set forth at section 3 of the Small Business Act (15 U.S.C. § 632). That definition is, in relevant part, as follows: " . . . a small business concern is . . . one which is independently owned and operated and which is not dominant in its field of operation . . . ." Clearly, many of the entities that would be affected by BPP are independently owned and operated, and all such entities (with the exception of AT&T and the LECs) are not dominant in their fields of operation.

92 See 5 U.S.C. § 603.

For example, Section 603(b)(2) of the Regulatory Flexibility Act requires that each initial regulatory flexibility analysis shall contain "a succinct statement of the objectives of . . . the proposed rule." The Commission's "statement of objectives" is as follows:

> *Objectives*: The objective of this Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.[93]

Stating that the "objective" of a notice of proposed rulemaking is to afford an opportunity for comment on a proposed rule does not constitute a statement of the Commission's objective in proposing a rule. An objective of every notice of proposed rulemaking is to afford parties an opportunity to comment on proposed rules. That is not, however, a statement of the Commission's objective in proposing the rule itself. By failing to provide any explanation of its objective for proposing BPP, the Commission's regulatory flexibility analysis does not comply with the Regulatory Flexibility Act.

Section 603(b)(4) of that act requires that the regulatory flexibility analysis include a "Description of the reporting, record keeping and other compliance requirements of the proposed rule . . . ."[94] The Commission's entire discussion of the "Reporting, record keeping and other compliance requirements " is as follows:

"None."[95]

Under the Commission's BPP proposal, every LEC will be required to modify its access service tariff provisions governing public telephone access and other aspects of their equal access services, existing OSP regulations regarding branding, posting and other requirements will have to be revised, aggregators may even be prohibited from

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93 NPRM, *supra*, 7 FCC Rcd. at 3034.
94 5 U.S.C. § 603(b)(4).
95 NPRM, *supra*, 7 FCC Rcd. at 3034.